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MICHAEL RODAK, JR. C

In The

Supreme Court of the United States

October Term, 1978

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No. 78-1512

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BEVERLY ANN SCHWARTZ, By Her Next Friend, LARRY SCHWARTZ,

Petitioner,

vs.

GORDON GILSTER, Sheriff of Lincoln County, Nebraska,

Respondent.

—o—

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

—o—

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Respondent, Gordon Gilster, Sheriff of Lincoln County, Nebraska, respectfully requests that this court deny the petition for certiorari seeking review of the Eighth Circuit's opinion in this case.

Respondent accepts petitioner's Statement of the Case.

—o—

REASONS WHY THE WRIT SHOULD BE DENIED

I.

There is no Conflict Among the Circuits on the Issue Involved Herein.

In the first section of her argument, petitioner points out that the district court relied upon *United States v. Olson,* 473 F. 2d 686 (8th Cir. 1973), in denying her petition for writ of habeas corpus, and that the Court of Appeals affirmed on the basis of the district court's opinion.

Petitioner then cites *United States v. Butera,* 420 F. 2d 564 (1st Cir. 1970), and says, "The divergence of these opinions is obvious." The truth is that these two opinions are not conflicting, and that *Butera* should be cited by respondent in support of the proposition that statutory age requirements for jury service are valid. In footnote no. 15 the Court said:

> "Defendant has *not* complained about the total exclusion of persons under 21. If he had, an adequate response would have been the statute limiting jury service to persons 21 and over. Thus a defendant would have to demonstrate the invalidity of that statute before he could complain of the exclusions of persons under 21. But see United States v. Tantash, 409 F. 2d 227, 228 (9th Cir. 1969), cert. denied, 395 U. S. 868, 89 S. Ct. 2115, 23 L. Ed. 2d 754 (1969) (statute limiting jury service to those 21 and over held valid."

We have not undertaken a search of the decisions of all of the circuits to determine whether any conflict exists, but we assume petitioner tried to find some cases holding such statutory requirements invalid. Her failure

to cite any cases upholding her contentions seems to indicate that no such authorities, and no such conflict in the circuits, exist.

II.

The Decision of the Court Below is not in Conflict with any Opinions of this Court.

In the third section of her argument the petitioner contends that the decision in this case violates the mandates of *Taylor v. Louisiana,* 419 U. S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692 (1975), and *Duren v. Missouri,* — U. S. —, 58 L. Ed. 2d 579 (1979). It does not. In *Taylor* women were eligible for jury duty, but were systematically excluded by the system of not calling them unless they filed a written declaration of their desire to serve. An eligible class was therefore grossly underrepresented in the venire. The court held this improper, but said:

> " . . . The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community. . . . "

In *Duren,* women were excused upon request, again resulting in gross underrepresentation. This court held that the Missouri system of permitting women to "opt out" was comparable to the Louisiana system of requiring them to "opt in," and that the resulting underrepresentation violated constitutional requirements.

Neither of these cases indicates that reasonable statutory requirements are improper, and, as a matter of fact, both sanction such statutory provisions.

Obviously, some minimum age for jury duty is required. The line must be drawn somewhere. We suppose even petitioner would not suggest that ten year old children should serve. Yet, any line is inherently arbitrary. No one can demonstrate that those over a certain age are qualified, and that those a month younger are not. It is the Legislature's business to draw lines in this sort of situation. It has done so, and, unless the lines are entirely unreasonable, it should not be the prerogative of the courts to substitute their judgment for that of the Legislature.

In *Hernandez v. Texas,* 347 U. S. 475, 98 L. Ed. 866, 74 S. Ct. 667 (1954), the court said that the guarantees of the Constitution had been violated when the laws, as written or applied, single out a class for different treatment "not based on some reasonable classification." The question is whether it is reasonable to classify those below 21 years of age as ineligible for jury duty.

Petitioner urges the age of 18 as the minimum, but there is no more magic in that number than there is in 21. In *United States v. Olson,* 473 F. 2d 686 (8th Cir. 1973), the contention was made that the Twenty-sixth Amendment mandated lowering the age for jury service to 18. The court said:

> "In sum, there is no support in law or logic for the proposition that the right of jury service is a concomitant subsidiary of the franchise."

Of course, until very recently the age of majority almost everywhere was 21. In Nebraska it is now 19. See Neb. Rev. Stat. § 38-101 (1974 Reissue). The fact that the people or the Legislature may have wished to extend the right of franchise, or the right to manage

their own affairs, to young people at an earlier age does not automatically require that they be entrusted with the often vitally important function of sitting on a jury and deciding someone else's fate. Certainly some minimum age for such responsibilities is appropriate, and the Legislature quite properly selected the age of 21.

The same reasoning applies to the statutory upper limit of 70 years. No one, least of all this writer, would contend that no persons over 70 years of age would make satisfactory jurors. One must admit, however, that persons past that age, as a class, suffer from poorer vision, poorer hearing, and numerous other physical ailments which would hamper them in their duties. Many suffer from impaired mental faculties. While it might be possible to uncover such imperfections on voir dire examination, it would, at the very least, be difficult, and many would not be discovered. Litigants would be faced with the dilemma of challenging for cause fine, respectable people whose mental abilities had slipped, to the humiliation of those challenged, or exercising preemptory challenges which should be put to better use. We cannot believe that any court will hold that this sort of classification violates constitutional standards.

On direct appeal petitioner made this same contention. In *State v. Schwartz,* 199 Neb. 17, 255 N. W. 2d 859 (1977), the court relied upon *State v. Foster,* 196 Neb. 332, 242 N. W. 2d 876 (1976), in rejecting the argument. In *Foster* the court held that 19 and 20 year old persons did not constitute a cognizable class of "the young" and their interests and attitudes were adequately represented by young people over 21 years of age.

Both the district court and the Court of Appeals concurred in this conclusion, the district court further pointing out the complete absence of any showing that the attitudes of the excluded classes were different from those of eligible jurors.

CONCLUSION

There is no support whatever for petitioner's complaint, and no conflict in the circuits. The classifications made by the Nebraska Legislature are clearly reasonable and should be sustained. There is no evidence that the excluded classes would add anything to the jury which is now lacking.

The petition for certiorari should be denied.

Respectfully submitted,

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